Supreme Court, U.S.
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No. 98-1831

IN THE

Supreme Court of the United States

LUCIANO MONTALVO, Individually and as the Parent and Guardian of MICHAEL MONTALVO,

Petitioner,

v.

JAMES P. RADCLIFFE, II and SOUTHSIDE VIRGINIA POLICE KARATE ASSOCIATION, INCORPORATED, d/b/a U.S.A. BUSHIDOKAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

NATHANIEL M. COLLIER, III
Attorney for Respondents
200 Lakeview Avenue
Suite C
Colonial Heights, VA 23834
(804) 520-2319

153521

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

1284

QUESTIONS PRESENTED FOR REVIEW

The sole issues presented to the Fourth Circuit Court of Appeals for review of the judgment of the United States District Court for the Eastern District of Virginia were whether the decisions of the District Court that U.S.A. Bushidokan presented competent evidence that Michael Montalvo's condition posed a "direct threat" to the health and safety of other class members, and that the offer of U.S.A. Bushidokan to provide private lessons for Michael was a reasonable accommodation for Michael's disability, were clearly erroneous. Therefore, the sole issues properly brought before this Court should be those presented for appeal to the Fourth Circuit Court United States Court of Appeals. (*See* "Issues Presented for Review" in Montalvo's brief to the Fourth Circuit Court's Appeals).

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, Southside Virginia Police Karate Association, Incorporated, d/b/a U.S.A. Bushidokan, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Case:

Bragdon v. Abbott, 118 Supreme Court 2196 (1998) 6

Statute:

42 U.S.C. § 12182(b)(3) 1

Respondent James P. Radcliffe, II and Southside Virginia Police Karate Association, Incorporated, d/b/a U.S.A. Bushidokan (hereinafter collectively referred to as "Bushidokan"), respectfully responds to Luciano and Michael Montalvo's (hereinafter referred to as "Montalvo") Petition for a writ of certiorari, requesting this honorable Court to affirm the decision of the United States District Court for the Eastern District of Virginia as upheld by the United States Court of Appeals for the Fourth Circuit, that Michael Montalvo's presence in the karate class posed a direct threat to the health and safety of students in the karate school, and therefore he could be barred from participating in such classes pursuant to 42 U.S.C. § 12182(b)(3).

STATEMENT OF THE CASE

Bushidokan adopts Montalvo's statement of the facts and proceedings and decisions in the courts below, with the exception of the additions and corrections set out herein. Montalvo's statement of the case omitted certain important aspects of this case. While Bushidokan acknowledges that Dr. Susan Lavoie submitted an Affidavit indicating that Michael Montalvo was "fit to begin karate classes", the Affidavit conveniently failed to address Michael Montalvo's HIV status. In other words, while Michael Montalvo may have been physically able to participate in such activities, the Affidavit did not address the risks, if any to the other students in the class, which was the basis of Mr. Radcliffe's request for information. When Dr. Lavoie was examined in the trial of this matter, she acknowledged that universal precautions would not be effective in reducing transmission between combatants engaged in the activities conducted at U.S.A. Bushidokan, and she further acknowledged that blood spilled into the open wound of an individual from

someone infected with the HI virus would have the potential for transmission of the virus. Dr. Lavoie also testified that the spilling of blood of an HIV positive individual into the eye of a combatant would create a scenario inviting the transmission of the virus because "a cornea is a particularly porous membrane that has special recommendations with regard to universal precautions." (Ref. A90-91). Finally, Dr. Lavoie testified that there are many means of transmission of the virus other than sexual encounters, IV drug usage and sharing of blood supplies, such as the sharing of toothbrushes, and the use of contaminated dental instruments. (A85-A88).

Dr. Carey Bruce Savitch, a physician specializing in infectious diseases, with twenty percent (20%) of his practice devoted specifically to HIV and AIDS, and an assistant medical professor at University of California at Los Angeles, testified, without rebuttal, that universal precautions in a setting described at Bushidokan would be ineffective in preventing transmission of the HI virus, and in fact, testified that only "total body armor" would be effective in such a setting. (A125). He further testified that there was at least one known incident of HIV transmission through sports, describing the transmission of the disease to a soccer player from a head butt from an HIV positive individual. (A112).

Montalvo argued that because there was no quantifiable evidence regarding percentage possibilities of transmission, Michael Montalvo could not be excluded from the karate class. Montalvo cited studies indicating a .03 percent possibility of viral transmission through a needle stick. However, Dr. Savitch also testified regarding that study, and his testimony lends background which would be helpful

to this Court in assessing such a study. He pointed out that while one such study indicated a .03 percent incidence with a needle stick, when the people conducting the study separated the sticks where there was probably no fluid exchanged from those involving a significant deep wound, such as to the palm, they found the percentages to be 17 percent. (A105). Further, when studies were conducted involving instances in which it was known that blood was transferred, such as blood transfusions, the percentage of transmission was 100%. He further testified that there were numerous instances in which healthcare workers had been infected from blood splash injuries to the face. (A105).

Perhaps the most telling evidence explaining why it is nearly impossible to trace specific causes of transmission of the disease, was provided by Dr. Savitch's testimony. It is impossible to assess with mathematical precision the risk of transmission in any given activity because it is often eight to ten years before infected individuals are symptomatic. (A117). Without testing for the presence of the HIV virus from the point of contact, one simply cannot draw conclusions regarding the percentage of risk. The two cases which Dr. Savitch cited in defense of this position involved the soccer player in Italy, and Kimberly Bergalis, one of the dental patients associated with Dr. David Acer, the Florida dentist who is known to have infected several of his patients. The only reason that these non-sexual, non-IV transmissions were detected was the unusually early symptoms shown by both of these victims, accompanied by early testing, allowing doctors the opportunity to more closely trace the cause of transmission. Because most people do not show early symptoms, and because most people are not actually symptomatic until many years after their exposure, it is not possible in most cases to quantify

particular activities as being at risk for the disease, since due to the lapse of time, other risk factors cannot be excluded. (A118-119).

Radcliffe testified clearly that students in his class routinely engage in sparring, including blows to the facial area, many times followed by wrestling type maneuvers which maintain close contact between the combatants, and that this often leads to injuries causing blood flow, presenting numerous situations in which blood from one combatant can spill onto the other. (Joint appendix filed in the Fourth Circuit Court of Appeals pages 65-78).

Radcliffe also testified that his decision to bar an HIV positive individual from participating in such classes was based on specific training as a police officer in dealing with contaminated blood, including a forty hour course in which he was certified as a first responder in the medical field, and an eight hour course specifically on blood-borne pathogens. (Joint appendix filed in the Fourth Circuit Court of Appeals at page 88).

REASONS FOR DENYING THE WRIT

Bushidokan urges the Court to refuse a writ of certiorari for the following reasons:

1. There is no conflict in the United States Courts of Appeals with respect to the decision of the United States District Court, as upheld on appeal by the Fourth Circuit United States Court of Appeals.

2. There is no conflict between the decision in the instant case with any state courts of last resort.

3. The Fourth Circuit Unites States Court of Appeals simply upheld a factual finding by the Unites States District Court of the Eastern District of Virginia that the activities of the students in classes at U.S.A. Bushidokan, involving hard style karate, with emphasis of sparring, both with and without pads, presented numerous and repetitive opportunities for blood exchanges between the students, thereby justifying the exclusion of a student with AIDS. Under the evidence presented in the case, the decision was supported by sufficient facts for this Court to determine that the Unites States District Court for the Eastern District of Virginia did not depart from the accepted and usual course of judicial proceedings, and that therefore the exercise of the Supreme Court power of supervision is unnecessary.

4. The findings of the United States District Court for the Eastern District of Virginia, as upheld by the Fourth Circuit United States Court of Appeals, do not conflict with the applicable decisions of the Supreme Court.

ARGUMENT

The findings of the United States District Court for the Eastern District of Virginia, as upheld by the United States Court of Appeals for the Fourth Circuit, were not clearly erroneous, and should be up held on appeal. Montalvo for the first time addresses the issue regarding Bushidokan's failure to obtain a medical opinion prior to excluding Montalvo, such issue never having been addressed in the original appeal from the United States District Court for the Eastern District of Virginia. That issue was not preserved for appeal, and should not be addressed by the Court.

However, it is clear that Bushidokan did not exclude Michael Montalvo on the basis of hysteria or unsupported fears. Mr. Radcliffe clearly testified that as a police officer he had been trained rigorously in the dangers of dealing with contaminated blood, having completed a forty hour course for certification as a first responder in the medical field, and an eight hour course specifically dealing with blood-borne pathogens. (Joint appendix filed in the Fourth Circuit Court of Appeals at page 88). Regarding the argument that Mr. Radcliffe should have sought and relied on the public health authorities in making his decision, Chief Justice Rehnquist in his opinion in *Bragdon v. Abbott*, 118 Supreme Court 2196, at page 2216, wrote that in litigation between private parties, there was not rule of law which would "require or permit Courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General)." In fact, Bushidokan relied on the information, imparted in the course of medical training to Mr. Radcliffe, regarding the various risks of transmission of the HI virus.

This case presents a very simple and well defined legal issue, which is whether the decision of the United States District Court for the Eastern District of Virginia that Michael Montalvo presented a direct threat to the safety of the other participants is clearly wrong. Judge Richard Williams clearly set out his findings, and the basis for those findings, and those findings are supported by the evidence. Since the only issue perfected in the appeal to the Fourth Circuit United States Court of Appeals involved the sufficiency of the evidence to support those findings, this Court should dismiss the Petition for a Writ of Certiorari. Judge Williams found as a matter of fact that the unique

nature of training instruction at U.S.A. Bushidokan, which consisted of the heavy emphasis on sparring and actual fight simulation, resulted in a high frequency of minor but bloody abrasions among the students. He further found that due to the type of contact between the students, when a student is injured his blood is extremely likely to spill onto other students or instructional staff, despite the efforts of a well educated staff in dealing with blood injuries. Finally, he found, as cited by Doctors Lavoie and Savitch, that the use of universal precautions would not prohibit the transmission of the HI virus in the setting described at Bushidokan. (A34-A49).

Because the issues presented to this Court in Montalvo's Petition for a Writ of Certiorari were never perfected and presented to the Fourth Circuit United States Court of Appeals, this Court should not at this time address these issues. The evidence is clear that Bushidokan, through its owner Radcliffe, was aware, through medical training, of the risks of transmission of the HI virus. The evidence further supports the findings by the United States District Court for the Eastern District of Virginia that because of the unique and "hard style" of karate constantly practiced at Bushidokan, there was an extremely high likelihood that blood injuries would occur, and that blood would be spilled from one combatant on to the other, despite efforts to avoid such transmissions. Finally, relying on evidence presented by both Bushidokan's expert and Montalvo's expert, the court found that there was a significant and direct threat to the safety of the other participants in that blood introduced into open wounds, onto the cornea, and possibility onto intact skin of the other participants could result in the transmission of the HI virus. Given the 100% fatality rate of those infected with such disease, the court felt that this

direct threat was sufficiently significant to justify Radcliffe and Bushidōkan's decision to bar Montalvo from the classes. Finally, the court found that the offer of private lessons was a reasonable accommodation, ruling that requiring Bushidokan to shift its instructional methods from its "hard style" of karate would eliminate the essential function of its enterprise, which is not necessary under the Americans with Disabilities Act. (A46).

Montalvo, both in its appeal to the Fourth Circuit United States Court of Appeals and in its Petition to this Court for Writ of Certiorari, seeks to introduce a multitude of medical evidence, including information regarding the psychological effects of discrimination due to HIV, all of which evidence is sought to be introduced for the first time on appeal. Bushidokan respectfully requests that this Court ignore such evidence, and restrict its review of the case to that evidence which was actually presented at the trial of this matter.

CONCLUSION

For the following reasons cited above, Bushidokan respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NATHANIEL M. COLLIER, III
Attorney for Respondents
200 Lakeview Avenue
Suite C
Colonial Heights, VA 23834
(804) 520-2319